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DOCKET FILE COPY ORIGINAL

December 24, 1997

**VIA FEDERAL EXPRESS**

Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
1919 M Street, NW  
Room 222  
Washington, D.C. 20554

Re: Comments to Petition for Reconsideration Filed by NextWave Telecom, Inc.  
Regarding Broadband PCS C and F Block Installment Payment Issues As Set  
Forth in WT Docket 97-82; Submitted on Behalf of Duluth PCS, Inc., St., Joseph  
PCS, Inc. and West Virginia PCS, Inc.

Dear Ms. Salas:

Submitted herewith, in original and eleven (11) copies, on behalf of Duluth PCS, Inc., et al. each licensee of numerous Personal Communications Services ("PCS") markets throughout the United States, are its Comments in response to the Petition for Reconsideration filed by NextWave Telecom, Inc., concerning issues set forth in FCC Second Report and Order, AMENDMENT OF THE COMMISSION'S RULES REGARDING INSTALLMENT PAYMENT FINANCING FOR PERSONAL COMMUNICATIONS SERVICES (PCS) LICENSES, WT Docket #97-82, 97-342, Fed. Reg. 55375, released October 24, 1997.

Should the Commission have any questions concerning these matters, please contact the undersigned.

Sincerely,

Richard L. Vega, Jr.  
President

Enclosures

cc: Duluth PCS, Inc., et al.  
Honorable Chairman William E. Kennard  
Honorable Commissioner Harold W. Furchtgott-Roth  
Honorable Commissioner Susan Ness  
Honorable Commissioner Michael K. Powell  
Honorable Commissioner Gloria Tristiani

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
)  
Amendment of the Commission's )  
Rules Regarding Installment Payment )  
Financing for Personal Communications )  
Services (PCS) Licenses )  
)  
Amendment of Part 1 of the Commission's )  
Rules - Competitive Bidding Proceeding )

WT Docket No. 97-82

**REPLY COMMENTS ON PETITIONS FOR RECONSIDERATION**

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December 24, 1997

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## **TABLE OF CONTENTS**

|  | PAGE    |
|--|---------|
| <b>I. INTRODUCTION</b>   | 3 - 4   |
| <b>II. REPLY COMMENTS ON PETITION FOR RECONSIDERATION<br/>FILED BY NEXTWAVE TELECOM INC.</b> | 4 - 9   |
| <b>III. CONCLUSION</b>   | 10 - 11 |

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
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| Amendment of Part 1 of the Commission's | ) |                     |
| Rules - Competitive Bidding Proceeding  | ) |                     |

**REPLY COMMENTS OF DULUTH PCS, INC., ST. JOSEPH PCS, INC. AND  
WEST VIRGINIA PCS, INC. ON PETITIONS FOR RECONSIDERATION**

Duluth PCS, Inc., St. Joseph PCS, Inc. and West Virginia PCS, Inc. ("Companies" or "the Companies") hereby reply to the numerous comments and petitions for reconsideration filed with the Commission pertaining to the above-captioned proceeding.<sup>1</sup> These comments are being filed by the President of the Companies, Richard L. Vega, Sr.

**I. INTRODUCTION**

The Companies are small businesses which collectively hold broadband PCS licenses in 6 Basic Trading Areas ("BTAs"). The Companies hold the following PCS licenses: the C block PCS licenses for Duluth, Minnesota and St. Joseph, Missouri; the D block PCS license for Ottumwa, Iowa; and the F

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<sup>1</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Second Report and Order, WT Docket No. 97-82, FCC 97-342, 62 Fed. Reg. 55375 (October 24, 1997)

block PCS licenses for Kirksville, Missouri, Parkersburg, West Virginia - Marietta, Ohio and Logan, West Virginia. All of the Companies are current with respect to their PCS license payments and all of such payments were made in a timely manner.

Richard L. Vega, Sr., President of each of the Companies, is also the Chairman of The Richard L. Vega Group, Inc., a Telecommunications Engineering and Management Consulting Company which has been providing its services to the wireless industry for the past twenty-five years.

## **II. REPLY COMMENTS ON PETITION FOR RECONSIDERATION FILED BY NEXTWAVE TELECOM INC.**

On November 24, 1997, NextWave Telecom Inc. ("NextWave") filed a Petition for Reconsideration under WT Docket No. 97-82 concerning the aforementioned proceeding.<sup>2</sup> The Companies file these comments in support of the following NextWave requests to modify the *Restructuring Order* (the respective NextWave requests for which the Companies are filing reply comments of support appear below in bullet point format)<sup>3</sup>:

- The "election date" by which C block licensees must select from the options menu must be deferred to allow the Commission adequate time to complete work on several matters that are wholly or intrinsically related to implementation of the *Restructuring Order*. These matters include resolution of pending issues in the Part 1 Rewrite Proceeding concerning C block control group rules, as well as clarification of what role, if any, the Commission intends the U.S. Department of Justice to play in connection with *Restructuring Order* implementation.

The Companies agree with the arguments put forth by NextWave relative to the Commission deferring the "Election Day" notification. Those arguments being that the Commission should complete its *Part 1 Proceeding* expeditiously; clarify whether the Commission's authority over spectrum auction

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("Restructuring Order").

<sup>2</sup>Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Second Report and Order, WT Docket No. 97-82, FCC 97-342, 62 Fed. Reg. 55375 (October 24, 1997) ("Restructuring Order").

<sup>3</sup> See Petition For Reconsideration of NextWave Telecom, Inc., WT Docket No. 97-82, (November 24, 1997) at 4.

installment payment policies is exclusive, or must be shared with other federal agencies such as the U.S. Department of Justice; and allowing ample time for World Trade Organization ("WTO") agreement implementation to allow the potential inflow of capital to licensees from foreign markets, thus influencing a licensee's "Election Day" decision.<sup>4</sup>

- The Commission should expand the options menu to include a modest deferral of payment obligations, which would allow licensees to devote their capital exclusively to build out activities in the near term, while requiring them to pay their bid in full and all accrued interest within the existing license term.

Given that the U.S. capital markets were not persuaded by the Commission's *Restructuring Order* that a commercially reasonable debt payment structure is in place, the Companies believe that the Commission should come to grips with the severity of the capital crisis facing C block licensees and defer installment payment obligations for 5 years. Such a plan should call for Licensees to repay the entire net winning bid amount plus interest, including interest on deferred interest, thereby keeping the government whole. The Companies agree with the NextWave assertion that the Commission justified its dismissal of deferral proposals without considering substantial contrary record evidence and argument that deferral is not unfair to anyone and is wholly in accord with the Commission's rules and relevant precedent.<sup>5</sup>

- Licensees should be permitted to apply their entire down payments under the disaggregation and prepayment options. The current restrictions constitute unprecedented, unjustified, multi-million dollar fines on C block licensees, none of whom has ever defaulted on a C block obligation.

While only the Commission is in the position to determine whether any C block licensee has defaulted on its installment payment obligations, the Companies believe that the vast majority of C block licensees have not defaulted on their respective installment payment obligations. The Companies

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<sup>4</sup>See Petition For Reconsideration of NextWave Telecom, Inc., WT Docket No. 97-82, (November 24, 1997) at 19, 20, 21.

<sup>5</sup> See Petition For Reconsideration of NextWave Telecom, Inc., WT Docket No. 97-82, (November 24, 1997) at 23.

believe that the Commission's decision to impose huge penalties on licensees, in the form of the loss of 30 percent and 50 percent of their down payments under the buyout and disaggregation options, is unreasonable, punitive in nature and contradictory to the public policy objectives sought by Congress in the legislation authorizing the entrepreneur's spectrum block.

Members of the Commission, on several occasions, have publicly stated that "the Commission was not guaranteeing the success of licensees". The entrepreneurs behind PCS development stage companies that strive to launch their businesses and see them flourish know best the long odds that face them in their quest to succeed against the deep pocketed incumbents. When they encounter adversity, they seek to find solutions to such problems in order to implement their business plans. While unfortunate, it is not unusual for development stage enterprises in capital intensive industries to seek the restructuring of debt obligations, when necessary, in order to prevent their enterprises from failing. This fact of life is acknowledged in rules adopted by the Commission well before the start of the C block auction. The Commission in section 1.2110(e)(4)(ii) of its rules provides for the restructuring of payment schedules. The rule addresses the grant of "grace periods" during which installment payments may be suspended; states that the Commission may "otherwise approve a restructured payment schedule" upon an appropriate showing of a need for relief; and lists the factors to be used for evaluating such requests.<sup>6</sup> It is clear to the Companies, that the rule contemplates a restructuring which fundamentally alters payment terms beyond any temporary grace period established by the Commission. This is evident by the evidence introduced by NextWave in its Petition for Reconsideration. NextWave cited the Commission's discussion of the rule when it was adopted.<sup>7</sup>

During this grace period, a defaulting licensee could maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the Commission a

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<sup>6</sup> 47 C.F.R. Section 1.2110(3)(4)(ii).

<sup>7</sup> See Petition For Reconsideration of NextWave Telecom, Inc., WT Docket No. 97-82, (November 24, 1997) at 10.

restructured payment plan.<sup>8</sup>

The Companies concur with the NextWave assertion that nothing in the rule itself, or in any Commission order discussing it, even hints that a party requesting restructuring would be subject to *any* financial penalty, much less the huge penalties contemplated under the *Restructuring Order*. The Companies respectfully question the Commission's judgment on this issue and fail to see how the imposition of such penalties will enable small businesses, such as ours, to enter the PCS industry and flourish so that the Commission maximizes the cash received from the license auctions.

The Commission is used to dealing with the deep pocketed incumbents with A and B block licenses (some also hold D and E block licenses) such as the Regional Bell Operating Companies and cable companies, with their virtual monopolies on local service providing them with enormous cash flow to fund their start-up PCS enterprises. While these entities could sustain severe penalties, the truly small businesses encouraged to enter this industry by Congressional legislation simply cannot.

The Commission's attempt to rationalize such penalties by equating them to assessments due under other auction rules is unpersuasive. The rules cited by the Commission relate to penalties for bid withdrawals and defaulting on down payment obligations.<sup>9</sup> The Companies agree with the NextWave assertion that the Commission cannot lawfully apply penalty rules to entities that the Commission already has determined are not subject to such rules.<sup>10</sup>

From our vantage point, the Commission's *Restructuring Order*, if implemented will result in the usual telecommunication titans obtaining a stranglehold on the emerging PCS industry, thus stifling competition and the lower prices that it yields for consumers. It will also prevent creative service

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<sup>8</sup> See *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 2348, 2391 (1994). (emphasis added)

<sup>9</sup> See e.g., *Restructuring Order*, at para. 65 n. 146.

<sup>10</sup> See Petition For Reconsideration of NextWave Telecom, Inc., WT Docket No. 97-82, (November 24, 1997) at 12, 13.



offerings from locally run small businesses such as ours. Evidence of this is simple, the vast majority of PCS operators presently providing service are controlled by monopoly wireline telecommunication and cable companies. Only a few new PCS entrants without monopoly based cash flow have emerged and our operating today.

The inability for small emerging PCS companies to access the capital markets as a result of an unforeseeable shift in the attitude of Wall Street toward new emerging PCS entrants was startling and, in our opinion, partly attributable to unexpected administrative policy shifts which we perceive to be contrary to Congressional intent and legislation. As this proceeding drags out, the traditional incumbent cellular and A and B block PCS operators reap the enormous market share and cash flow benefits from the delayed entry, or worse, lack of entry, by small entrepreneurial entities such as ours. This further exacerbates the prevailing negative outlook for C and F block entities, such as ours, on Wall Street. Accordingly, absent change to the Commission's *Restructuring Order*, it is unlikely that the competitive environment envisioned by Congress, with a place reserved for small entrepreneurial entities, will ever be realized.

- The reauction of surrendered spectrum should be open to any C block licensee that has maintained its good standing under the auction rules by meeting all of its payment obligations.

The Companies concur with the NextWave assertion that barring C block licensees who choose the disaggregation or prepayment options from participating in a reauction of C block spectrum, and from acquiring such spectrum on the secondary market for two years thereafter,<sup>11</sup> is unwarranted, unreasonably discriminatory and contrary to the Commission's auction and spectrum management policies. The Commission's restriction cannot be squared with the "amnesty" option whereby the

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<sup>11</sup> See *Restructuring Order*, at paras. 42, 69.

Commission will allow an entity that surrenders all of its spectrum to fully participate in any reauction, and to acquire spectrum unimpeded in secondary markets.<sup>12</sup> The *Restructuring Order* does not provide a rational basis for differential treatment of licensees that choose the “amnesty” option and those who choose the prepayment or disaggregation options, and there is none. The Companies strongly urge the Commission to allow any C block licensee that is not in default and has made all installment payment obligations in a timely manner to participate in a reauction and acquire licenses in the secondary market without any time restriction.

- The prices paid under the prepayment option should reflect the net present value (“NPV”) of foregone installment financing. By failing to make an NPV adjustment to account for the time value of money, the Commission has effectively increased license prices by a minimum of 40 percent. An NPV adjustment to nominal bid amounts is required to correct this error. The adjustment is not a “discount” and it does not reduce the bid amount in real terms. It is standard commercial practice to make an NPV adjustment any time a debtor “buys back” commercial paper which includes a term payment. The adjustment yields a “Current Note Value” that mirrors the alignment of creditor and debtor interests reflected in the original payment schedule.

The Companies believe that the prepayment option should include the well established concept of the use of NPV to determine a fair prepayment amount necessary to compensate a debtor for the acceleration of payments due at a later date. The time value of money and the use of NPV to determine a fair value today that debtors should pay in exchange for accelerating debt payments, is a concept which is routinely taught in finance courses by the business programs of colleges and universities throughout the nation. The Companies believe that an appropriate discount rate should reflect the weighted average cost of capital for development stage enterprises in the wireless communications industry. The record in this proceeding overwhelmingly supports the use of NPV for the prepayment option with a discount rate in the range of 15 to 20 percent. The appropriateness of this discount rate range could easily be confirmed by discussions with any reputable Wall Street investment banking firm.

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<sup>12</sup> See *Restructuring Order*, at para. 54.

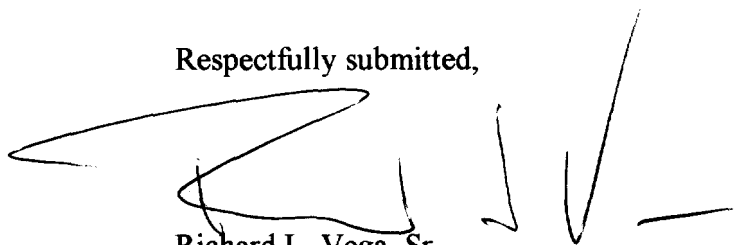
### III. CONCLUSION

The Companies strongly urge the Commission to implement the aforementioned modifications to the *Restructuring Order*. Such modifications are a reasonable means of furthering the Commission's stated goal of speeding the utilization of C block spectrum in the public interest. In addition, the Companies also request that the Commission avail to F block licensees equivalent restructuring options afforded to C block licensees. This would ensure proportional fairness to all entities meeting the definition of a small business under the Commission's rules. These F block licensees face the same capital crisis as C block licensees. They too have been extremely disadvantaged by the head start received by A block and B block licensees and further market share gains by the cellular incumbents. We say this from experience, as the Companies in aggregate are 59.5% C block, 12.4% D block and 28.1% F block licensees in terms of population ("pops") covered by the licenses with the relatively low spectrum acquisition cost of \$7.11 per pop (aggregate net winning bids divided by population in the licensed areas). Aggregation of the Companies is relevant and appropriate for the record in this proceeding, since the Companies presently have identical shareholders and control groups.

In closing, we seek to remind the Commission that C block and F block entities were encouraged to enter the PCS industry via Congressional legislation. Small business entities like ours believed that the federal government desired the creativity and well managed operations that such entrepreneurs would bring to make wireless service more affordable to the American public. Our inability to penetrate the U.S. capital markets for the extensive capital required to sustain these start-up enterprises until they are free cash flow positive was unforeseen and is unfortunate. Despite being a "low FCC debt" entity, our ability to raise the necessary capital to develop our licenses to their fullest potential is intertwined with the financial health and viability of the entire C block and F block licensees. This is due primarily

to intersystem operability and roaming issues. The entrepreneurs behind the C block and F block development stage companies believe in the PCS spectrum and believe in their ability to succeed. The present problem facing them is convincing the capital markets that they *will* succeed. They can't do this without the aid of the Commission. Accordingly, we believe the Commission *must* help foster the small business competition in the wireless industry that it sought rather than imposing huge punitive penalties to the entrepreneurs that have already taken extensive risk and entered the industry as desired by Congress.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to be 'R. Vega', is written over the typed name and title.

Richard L. Vega, Sr.  
President  
Duluth PCS, Inc.  
St. Joseph PCS, Inc.  
West Virginia PCS, Inc.